Supreme Court of the United States

OCTOBER TERM, 1948

No. 363

FELIX T. BOYLAN, *et al.*,

Petitioners,

vs.

LOUIS DETRIO, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Felix T. Boylan, Nobert S. Glasscheib, and Consolidated Tile Co., Inc., a corporation, respectfully petition this Honorable Court and show that this is a petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to review a judgment made and entered by that Court on July 23, 1948, which reversed in part a judgment of the District Court of the United States for the Southern District of Mississippi, made and entered on August 16, 1947 (R. 2240-1) and remanded the cause with directions (fol. 2281; R. 2279-80).

Summary Statement of Case

The claims of the respondents, Louis Detrio, Sylvester Detrio and Francis L. Marks, as set out in their complaints, are summarized in footnote "1" of the opinion of the Court of Appeals (fol. 2271, R. 2270-1).

In their original complaints, the respondents claimed to be partners of the partnership, Consolidated Tile and Deck Coverings,—a limited partnership organized and existing under the laws of the State of New York,—as of January 2, 1945, under a *written agreement*, which is marked Plaintiffs' Exhibit E (R. 40-45). In the amended complaint, the respondents altered the basis of their claims, and sought recovery under an *oral agreement* of partnership, claimed to have been made on or about February 28, 1945 (R. 63-65), and in their amendment to the amended complaint, made at the close of the trial (R. 2172), they alleged that this oral agreement was *amendatory* of the original written articles of limited partnership, marked Exhibit "A" (R. 22-30).

These claims, including those of fraud, conspiracy and conversion were specifically denied by the petitioners in their answer to the original complaint (R. 147-183), and their answer to the amended complaint (R. 201-223), and their further answer to the amendment of the amended complaint made at the close of the trial (R. 2171).

On September 4, 1945, and long prior to the institution of the action in the District Court, the respondent, Sylvester Detrio had commenced an action in the Supreme Court of the State of New York, New York County, against the petitioners Felix T. Boylan and Nobert S. Glasscheib, and others, for an accounting and the dissolution of the partnership. The pleadings in that action, which are marked Exhibit "1", are attached to and made part of the answer of the petitioners to the original complaint (R. 169-183).

In the New York action, the respondent, Sylvester Detrio, predicated his action on a partnership agree-

ment, allegedly made on or about February 24, 1945, which is similar to the oral agreement alleged by the respondents in their amended complaint.

The petitioners in their answer to the original complaint rendered an accounting to the respondent Sylvester Detrio,—on the basis of an 8% interest, and not on the basis of 5% as claimed by him,—and deposited the sum thus shown to be due him, which is now in the Registry of the District Court (R. 166-169).

The matters put in issue by the pleadings were fully litigated before the District Judge, as is evidenced by the voluminous record before the Court of Appeals and now before this Court on the petition for the Writ of Certiorari.

The District Judge who had the full opportunity of seeing the witnesses and judging their credibility, and after considering all of the evidence adduced, both oral and documentary, and after weighing the preponderences, drawing inferences, comparing presumptions, probing intent and balancing hypotheses, made his written Findings of Fact and Conclusions of Law (R. 2225-2240).

The District Judge found that the laws of the State of New York govern insofar as the formation of the limited partnership and any amendments thereto. The attempts to amend the original articles of partnership were incomplete and insufficient for the reason that there was never at any time a complete meeting of the minds of all parties in interest, either oral or written, touching the subject matter of the proposed amendment to the partnership (R. 2238-9). The District Judge further found that neither respondent Marks nor respondent Louis Detrio put up any part of his necessary capital contribution either in cash or property (R. 2234), and

that there was no gift of any interest in the partnership to the respondents, Marks and Louis Detrio, with the consent of all of the partners, that they should come in as partners in the partnership (R. 2239).

The District Judge further found that the proposed amendment to the articles of partnership, by which the respondent Louis Detrio would re-enter the partnership, and the respondent Marks would be taken into the partnership, was never adopted or agreed to, and they therefore did not become partners and were not entitled to any relief (R. 2239).

The District Judge further found that the petitioners, Boylan and Glasscheib, were acting in good faith and without any fraud or intent to defraud when they formed the corporation, Consolidated Tile Co., Inc., under the laws of the State of New York (one of the petitioners herein), and that the corporation was legally formed. That part of the assets of the partnership belonging to petitioners, Boylan and Glasscheib, were transferred to the corporation, and ample partnership assets were retained by the partnership to pay respondent, Sylvester Detrio, his 8% interest (R. 2237). The petitioners, Boylan and Glasscheib committed no fraud and were guilty of no stealing, conversion or misappropriation of any funds or property as was alleged in the complaint and the amended complaint (R. 2238).

The District Judge, in the judgment entered in the cause on August 16, 1947, specifically stated that the Court took jurisdiction of the suit for the purpose of determining if a new partnership had been formed wherein the respondent Louis Detrio would be a member. Having found that no such partnership was formed, the Court permitted the respondent Sylvester Detrio to withdraw the amount tendered and deposited, and relegated

him for any further rights to his pending suit in the State of New York, the domicile of the partnership (R. 2240-1).

The Court of Appeals in its opinion sustained the District Court in its findings in favor of the petitioners on the issues of fraud, conversion and misappropriation, as well as the legality of the formation of the corporation, Consolidated Tile Co., Inc. It also sustained the District Court in its finding that the written agreement (Exhibit E) was legally insufficient and therefore unenforceable (footnote 4, fol. 2275, R. 2274-76; fol. 2280, R. 2279). The Court of Appeals also affirmed the judgment of the District Court as to the respondent Marks (fol. 2280, R. 2279; fol. 2281, R. 2279-80).

However, the Court of Appeals found that by an *oral agreement* of February-March, 1945, the original written articles of limited partnership were amended, and under such oral agreement the respondent Louis Detrio re-entered the partnership as of March 2, 1945, on a basis of 36% of the profits, and as of the same date the interest of the respondent Sylvester Detrio in the partnership was reduced from 8% to 5%.

The Court of Appeals thereupon reversed the judgment of the District Court as to the respondents, Louis Detrio and Sylvester Detrio, and remanded the cause with directions to take and state an account on the basis found by it, and to enter judgment accordingly. In addition, the Court of Appeals ordered and adjudged that "the appellees Felix T. Boylan and others, be condemned in solido to pay the costs of this cause in this Court" (fol. 2281, R. 2280).

Questions Presented

(1) Can a limited partnership, formed and existing under the laws of the State of New York, admit a general partner by oral agreement, when the express provisions of Sec. 98 (1) (e) of the New York Partnership Law specifically provide that no general partner can be admitted without the written consent or ratification of all of the limited partners?

(2) Can such limited partnership be orally amended so as to admit a general partner, when the original written articles of partnership specifically provide that any amendments or alterations thereto must be in writing under the joint hands of all parties?

(3) Under the provisions of the New York Partnership Law, does an assignment by a partner of a portion of his partnership interest to a stranger, make the assignee a partner of the partnership?

(4) Can a person become a general partner and participate in the profits when he does not make his required capital contribution, as specifically agreed to by him?

(5) Has there been an abuse of discretion by the Court of Appeals, when in its judgment it awarded total costs against your Petitioners in solido?

Jurisdiction

This Court now has the power of unrestricted review of cases in the Courts of Appeals, either before or after rendition of judgment or decree, brought up on certiorari.

28 *United States Code*, Sec. 1254 (1). (See Appendix).

Reasons for Granting Writ of Certiorari and Specification of Errors

(1) The finding of the Court of Appeals that the respondent Louis Detrio re-entered the limited partnership under an oral agreement of amendment of the written articles of limited partnership, was contrary to the express prohibitory provisions of the New York Partnership Law applicable to limited partnerships.

Sec. 98 (1) (*e*), *Partnership Law*, Chap. 39 of Consolidated Laws of State of New York. (See Appendix.)

(2) The finding and judgment of the Court of Appeals, that the respondent, Louis Detrio, became a partner by reason of the oral assignments to him from various interests of the partners, was contrary to the provisions of the New York Partnership Law and in conflict with the applicable local decisions.

Sec. 53, *Partnership Law*, Chap. 39 of Consolidated Laws of the State of New York. (See Appendix);

Hammond Oil Co. v. *Standard Oil Co.*, 259 N. Y. 312, 325;

Becker v. *Hercules Foundries, Inc.*, 263 N. Y.) App. Div. 991.

(3) The decision of the Court of Appeals, that the original written articles of limited partnership were orally amended with the consent of all of the partners, so as to admit the respondent Louis Detrio as a general partner, completely disregarded the well established and uncontroverted facts adduced at the trial and nullified the express provisions of said agreement.

(4) The Court of Appeals in deciding that the respondent Louis Detrio became a partner without making his required capital contribution, completely disregarded the uncontroverted and established facts adduced at the trial.

(5) The Court of Appeals, in sustaining the findings of fact of the District Court, in favor of the petitioners on the vital issues of fraud, conspiracy, conversion and misappropriation, as well as sustaining the judgment of dismissal as against the respondent Marks, grossly abused its discretion when it awarded all costs against your petitioners in solido.

Since the Court of Appeals has decided important questions of law under the New York Partnership Law contrary to its express provisions, and in conflict with the applicable local decisions, this Court has the power to review the judgment of the lower Court under its supervisory powers over the administration of justice in Federal Courts.

McNabb v. *United States*, 318 U. S. 332, 340;

Thiel v. *Southern Pacific Co.*, 328 U. S. 217, 225;

Forsyth v. *Hammond*, 166 U. S. 506.

This Court has the unrestricted right to correct excesses of jurisdiction and will grant a review in the furtherance of justice.

In re Chetwood, 165 U. S. 443;

In re Watts and Sachs, 190 U. S. 1.

This Court has held that appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed.

Price v. *Johnston*, 334, U. S. 266, 291.

The corollary of this proposition is equally true. The appellate courts cannot make factual determinations, decisive of vital rights, which are contrary to the crucial facts fully developed on the trial and which are wholly uncontroverted.

We respectfully submit that this case is one of gravity and importance which should be reviewed by this Court.

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals, Fifth Circuit, commanding that Court to certify and send to this Honorable Court for its review and determination the full and complete Transcript of the Record of proceedings in the case numbered and entitled, "Louis Detrio, et al., Appellants versus Felix T. Boylan, et al., Appellees", Docket No. 12,279, so that the judgment of the Court of Appeals, Fifth Circuit, may be reviewed and reversed by this Honorable Court, and that the cause be remanded by this Honorable Court to the United States Court of Appeals, Fifth Circuit,

for further proceedings, and your Petitioners have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated: New York, N. Y., October 22d, 1948.

Respectfully submitted,

FELIX T. BOYLAN,

NOBERT S. GLASSCHEIB,

CONSOLIDATED TILE CO., INC.,

By

SOL M. SELIG,

Attorney for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1948

FELIX T. BOYLAN, *et al.*,

Petitioners,

vs.

LOUIS DETRIO, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Statement

This cause came before the United States Court of Appeals, Fifth Circuit, on an appeal by the respondents from a judgment of the District Court for the Southern Ditsrict of Mississippi, dated August 16, 1947, which dismissed the respondents' suit with prejudice, and relegated respondent Sylvester Detrio for any further rights to his action in New York courts,—a suit instituted by him long before the commencement of this cause in the District Court.

The Court of Appeals affirmed the judgment as to the respondent Marks, but reversed it as to the respondents Louis Detrio and Sylvester Detrio, and remanded the cause with directions. The date of affirmance and partial reversal is July 23, 1948 (fol. 2281, R. 2279-80).

The opinion of the Court of Appeals is contained in the Record (fols. 2270-2280, R. 2269-2279). The petition for rehearing, filed by the petitioners in the Court of Appeals was denied without opinion on September 16, 1948 (fol. 2286, R. 2285).

In view of the voluminous record, and in order to assist this Court, we are taking the liberty of quoting at length some of the pertinent testimony contained in the Record, to which we desire to call attention. We therefore respectfully ask the Court's indulgence.

POINT I

The Court of Appeals decided important questions of the New York Partnership Law in a way contrary to its express provisions and the applicable decisions of the New York courts.

The District Court in its Conclusions of Law (R. 2238) held that the laws of New York govern. The respondents in their pleadings as well as in their main brief filed in the Court of Appeals (Point I), conceded that the New York Laws are controlling in the cause.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64.

The limited partnership, Consolidated Tile and Deck Coverings, was created under the provisions of Article 8, of the New York Partnership Law, (relating to limited partnerships), and specific mention of this fact is made in paragraph "1" of the written articles of partnership (Exhibit "A") (R. 23).

The New York Court of Appeals has held in the case of *Lanier* v. *Bowdoin*, 282 N. Y. 32, that a limited partnership is exclusively a creature of the statute. Being such, the provisions of the New York Partnership Law, governing its formation, amendment and conduct, must be strictly adhered to and complied with.

I.

Section 98 (1) (e) of the New York Partnership Law (See Appendix), specifically provides that no general partner of a limited partnership, has the right, power or authority to admit a person as a general partner "without the written consent or ratification of the specific act by all the limited partners".

In conformity with this prohibition, paragraph 16 of the original articles of partnership (R. 30) specifically provided that any alterations or amendments of said articles were required to be in writing under the joint hands of all parties.

The attention of this Court is respectfully called to the fact that all prior amendments to the original articles of partnership were in *writing*, as required by law as well as by the terms of the partnership agreement. The certificate of amendment of May 15, 1943, under which additional limited partners were admitted (Exhibit B, R. 30-32), as well as the certificate of amendment of September 1, 1944, showing the withdrawal of the respondent Louis Detrio, as a general partner (Exhibit D, R. 36-39), were signed by the respondents, Louis Detrio and Sylvester Detrio, as well as all of the remaining partners.

The uncontradicted testimony of respondent Louis Detrio, fully substantiated by his own written memo-

randum, conclusively established that the discussions had between the petitioner Boylan and himself in February, 1945, touching upon his re-entry into the partnership as a general partner were merely tentative in form, and that all of the terms to be agreed upon were to be reduced to writing and signed by all of the partners before it would become valid and binding. Such signed agreement would then become an amendment to the original articles of partnership and conform with the provisions of the New York Partnership Law, as well as with the terms of the original partnership agreement.

Respondent Louis Detrio testified (R. 1542):

> "Q. And wasn't it understood between you and Mr. Boylan that this agreement was to be reduced to writing?
> A. Yes."

a fact which he subsequently and on March 19, 1945, confirmed in writing to respondent Glasscheib, when he wrote as follows (Deft. Ex. I-I) (R. 1545):

> "I signed and had notarized mine, Anthony and Phil's signature on enclosed. Phil's letter to you explained the enclosed to be filed *& new agreement to be drawn up by Selig.*" (Italics ours.)

When the respondent Louis Detrio was questioned about this written memorandum, he gave the following pertinent testimony (R. 1544):

> "Q. I am asking you this: Did you on this memorandum dated March 19, 1945, which I show you, state, 'I signed and had notarized my, Anthony's and Phil's signatures on enclosed. Phil's letter to you explained the enclosed to be filed and new agreement to be drawn by Selig.' Now

what did you refer to by 'new agreement'?

A. Probably our contract of February.

Q. That is the contract where you would be brought back into the copartnership?

A. That's right.

Q. So that in March, 1945, at the time when you wrote this memorandum, the agreement had not yet been prepared?

A. No. sir.

Q. The terms had not been discussed as to what would go into the agreement?

A. Made no difference.

Q. I asked you the question and I ask you to please make a responsive answer.

A. No, there was no discussion about it."

The District Judge made particular reference to this Exhibit (Deft. Ex. I-I) in his findings of fact. (See Finding No. 14; R. 2232-3).

The written agreement (Exhibit E) (R. 40-47) which was prepared to effectuate the prior tentative oral agreement, but which was not agreed to and signed by all of the partners, was held by the District Judge to be legally insufficient and unenforceable, and his findings were sustained by the Court of Appeals in its decision (fol. 2280, R. 2279; see also footnote 4 [9] and [10]; R. 2274, 2276).

Notwithstanding these facts and findings, the Court of Appeals nevertheless held that while the written agreement was legally insufficient and unforceable, the prior oral agreement was legally sufficient, and directed the District Court "to find that by the oral agreement Louis Detrio re-entered the partnership of March 2, 1945, on a basis of 36% of the profits" (fol. 2280, R. 2279; fol. 2281, R. 2279-80).

We respectfully submit that under the prohibitory provisions of Section 98 (1) (e) of the New York Partnership Law, and the express provisions of paragraph 16 of the original articles of partnership, the oral agreement as found by the Court of Appeals is legally insufficient and therefore unenforceable.

II.

The Court of Appeals in its opinion (fol. 2275, footnote 4, [8], R. 2275; fol. 2280, R. 2279) held that under the oral agreement of February-March, 1945, respondent Louis Detrio, (who at that time had no connection with the partnership), acquired by assignment certain partnership interests from the various partners, totalling in all to 36%, and by reason thereof, he became a partner with a 36% interest in the profits.

Under the New York Partnership Law, and the applicable decisions of the New York Courts, an assignee of a partnership interest does not thereby become a partner.

> *Sec.* 53, *Partnership Law,* Chap. 39, Consolidated Laws of State of New York (see Appendix);
>
> *Hammond Oil Co.* v. *Standard Oil Co.,* 259 N. Y. 312, 325;
>
> *Becker* v. *Hercules Foundries, Inc.,* 263 (N. Y.) App. Div. 991.

In the case of *Hammond Oil Co.* v. *Standard Oil Co.* (*supra*), the New York Court of Appeals stated (p. 325):

> "It is true that the sale of a partnership interest by one partner does not necessarily dissolve the partnership. Nevertheless, the purchaser

> does not thereby become a partner; does not become entitled 'to interfere in the management or administration of the partnership business'; does not gain the right to 'require any information or account of partnership transactions'; becomes entitled only 'to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled'. (Partnership Law: Cons. Laws, Ch. 39, Sec. 53.)"

We therefore respectfully submit that the determination of the Court of Appeals, that the acquisition by respondent Louis Detrio of certain percentages by assignment made him a partner, is contrary to the provisions of the New York Partnership Law and the applicable decisions of the New York Courts.

POINT II

The Court of Appeals made factual determinations, decisive of vital rights, which were contrary to the crucial facts, wholly uncontroverted, and fully developed upon the trial.

I.

The Court of Appeals, in its opinion (footnote 5, fols. 2277-8, R. 2277), refers to the testimony of petitioner, Boylan, (R. 709-10) as showing that there was complete unanimity amongst the partners for respondent, Louis Detrio, to re-enter the existing limited partnership as a general partner as of March 2, 1945, with a 36% interest in the profits from and after that date. The Court overlooked or completely disregarded the important and ex-

planatory testimony given by petitioner, Boylan, immediately following the part quoted by the Court (R. 710):

> "A. Well, I can say this: I did tell Louis on March 1 that his brothers, after I explained to them over the phone—I had to go further even because Louis Detrio asked me what the set-up would be and I said, 'after I talk to the boys I will be able to tell you', so I did get them on the phone and I have here a memorandum that each of them agreed to give varying percentages and amounting to 22%. So I said, 'I have 50% and if I give you 14 of this, for which you will pay me, we'll both have 36%', and that was agreed and *I said on this basis Louis Detrio was to make a cash capital contribution of* 36% *of* $120,000 *of the new partnership and he was to pay* $43,200 *and this sum was to be exclusive of the* $7,500 *he was to pay me and he agreed to this arrangement.* The only other question that came up was when I spoke to Glasscheib and asked him to give up 8%, he said, 'well, how about my salary. You know you gave me the interest after he got out and I gave up the salary.' I said, 'how much salary do you want?' He said, '$8,000'. So I said to Louis, 'he wants $8,000.' I said to him, 'I offered him $5,000 and he said, 'let's compromise at $6,500.'" (Italics ours.)

This excerpt, when read in conjunction with the excerpt quoted by the Court of Appeals clearly shows that as a condition precedent, respondent, Louis Detrio, was required to make a capital contribution. This was further emphasized when counsel for respondents again

interrogated petitioner, Boylan, with reference to the capital contribution to be made by respondent, Louis Detrio. The following testimony was given (R. 731):

> "Q. Then I believe you took that up with all the parties and they were all agreeable to the set-up? You phoned some of them and saw others individually, I believe?
>
> A. Yes, sir. As I said further, however, it was also agreed that same day that for his 36% —that the new partnership setup would be $120,000, and that his interest of 36% he was to pay cash $43,200 and this was to be exclusive of the $7,500 he was to pay me. In other words, 36% of $120,000, $43,200, and he agreed to this and then also agreed that Glasscheib was to get his $6,500, and that agreement was to start March 1."

With reference to the cash capital contribution which respondent, Louis Detrio, was required to make under the agreement, respondent, Boylan, further testified (R. 974):

> "Q. Did you have any conversations with Mr. Louis Detrio at that time about the payment of his cash capital contribution to the copartnership?
>
> A. Yes, I did have conversations with him.
>
> Q. What did Mr. Louis Detrio say to you and what did you say to Mr. Louis Detrio at that time?
>
> A. I told him that he had better get in his cash contribution and he said he was going to sell some securities and do so."

Respondent, Louis Detrio, admitted that he did not make his required capital contribution (R. 1563):

> "Q. I ask you again, did you actually pay into the Consolidated Tile and Deck Coverings any money as your capital contribution from the date when you signed this agreement (Pltffs. Ex. 5) which was in May, 1945? Did you actually put any money into the Consolidated Tile and Deck Coverings?
>
> A. If you mean, Mr. Selig, that I went to a bank and drew out in nickels and brought them to the New York office and laid them on the table, no."

The finding by the District Judge that respondent, Louis Detrio, did not make his required capital contribution (Finding No. 16; R. 2234) is therefore fully supported by the uncontradicted evidence.

Since the respondent failed to make his required capital contribution and to perform his part of the agreement, he did not become a partner. Not being a partner, he cannot recover any profits.

Smith v. *Maine*, 145 (N. Y.) Misc. 521;

Thomas v. *Wisconsin Dept. of Taxation and Finance*, 250 Wisc. 8, 26 N. W. 2d 310;

McGraw v. *Pulling*, (Miss.) 1 Freeman's Chancery 357.

II.

The Court of Appeals, in its opinion, made this categorical finding (fol. 2279, R. 2278):

> "We, therefore, agree with appellant that the

findings of the District Judge, that the February-March oral agreement was never completed and that no partnership resulted from it, were clearly erroneous, indeed without any support in the evidence, and that this is so also as to his finding that Detrio's purchase of 14% from Boylan was contingent and revocable."

This finding is wholly contrary to the uncontroverted evidence of the respondents and their witnesses. We are taking the liberty of setting out the important excerpts of the testimony adduced on the vital and decisive question as to whether there was a complete meeting of the minds,—a necessary prerequisite to any contract. We feel certain it will aid the Court in going through the voluminous record.

Respondent, Louis Detrio, testified (R. 1541):

"Q. So that at no time during the month of February or during the month of March that you had any conversation with any of your brothers and with Mr. Glasscheib with reference to your re-entry into the partnership?

A. I personally did not."

He further testified (R. 1539):

"Q. I am asking you, was there any date set in the conversation between you and Mr. Boylan on March 1, as to the effective date of your re-entry into the copartnership?

A. No, sir."

On page 1537 of the Record, respondent Louis Detrio testified as follows:

"Q. Now, you stated that at that meeting there was some discussion with reference to your coming back into the copartnership?

A. Yes, sir.

Q. Becoming a general partner?

A. Yes.

Q. And only you and Mr. Boylan becoming general partners and all the others remaining limited partners?

A. Yes.

Q. And at that time the effective date of your re-entry into the copartnership was March 1, 1945?

A. No date set, Mr. Selig, by anybody.

Q. That was left in abeyance?

A. We hadn't even thought about it."

Respondent, Louis Detrio, when testifying with reference to the terms of the written agreement which was to be drawn with reference to his readmission into the partnership, gave this significant testimony pertaining to the prior oral agreement, which the Court of Appeals sustained (R. 1557):

"Q. And do you remember my asking you if that was part of the agreement you had prior to the time when you were to come in, do you remember that?

A. *We never expressed the terms of the agreement in February, Mr. Selig.*" (Italics ours.)

and when testifying orally before the District Judge, he categorically stated as follows (R. 1964):

"I asked Mr. Boylan when would this partnership become effective. Orally we had agreed, but we had never considered whether it would begin March 1 or April or any time."

This testimony therefore clearly established that the terms of the alleged oral agreement of March 2d had not been determined nor agreed upon, but were held in abeyance until the agreement was reduced to writing and signed by all the partners, as required by the original articles of partnership and the applicable provisions of the New York Partnership Law.

Anthony Detrio, a partner, called as a witness in behalf of the respondents, testified that he was present part of the time at the initial meeting on February 26, 1945, held between respondent, Louis Detrio, and petitioner, Boylan. On cross-examination he testified (R. 603):

"Q. During that time, what was said by Mr. Boylan?

A. He told me he had talked to Louis about coming back into the partnership and he gave me the set-up. He asked me if I would give back 3% and I said I would immediately.

Q. At that time what was the effective date that was agreed upon for your brother, Louis, to come back into the partnership?

A. Starting the first of the year.

Q. Are you certain of that?

A. Positive."

Subsequently he altered his testimony and stated (R. 610-11):

"Q. The only thing you know was that Mr. Detrio, your brother, Louis, was to come back into the partnership on the same basis as existed before and that it was to be effective as of February 1, 1945?

A. That is right.

Q. Was there anything said with reference to making the effective date March 1, 1945?

A. No one talked to me about it."

Albert Detrio, who was a partner, was also called as a witness in behalf of the respondents. He testified that he would not relinquish any part of the percentage of his interest in the partnership to respondent, Louis Detrio, and stated (R. 421):

"Q. Before you sold out to Mr. Boylan, you insisted upon 13%?

A. That is right.

Q. And up to the time when you sold out to Mr. Boylan, you were always insisting that you were entitled to thirteen percent?

A. That is right."

Later in his testimony, when he was questioned about the telegram from respondent, Louis Detrio, to petitioner, Boylan (Defts. Ex. JJ; R. 1586) wherein the respondent, Louis Detrio, had wired petitioner, Boylan, to have Albert Detrio withdraw on a basis of 8% interest and not on the basis of his 13% interest, he (Albert Detrio) gave the following important testimony (R. 441-2):

"Q. Didn't Mr. Boylan show you a telegram that he had received from Mr. Louis Detrio, your brother, asking that you, if you were getting out, to get out at 8 percent?

A. I believe that Louis was insisting right along that I get out at 8 percent.

Q. You didn't want to get out at 8 percent?
A. No, sir.

Q. You wanted to get out at 13 percent?
A. That is right. I hadn't signed any agreement at the time and I thought I was entitled to 13 percent.

Q. There was no other agreement on September 1, 1944, upon which you and your brothers were operating there with Mr. Glasscheib and Mr. Boylan?
A. As far as written agreement but there was just that verbal testimony through Mr. Boylan about getting Louis back.

Q. You disregarded that agreement?
A. That is right.

Q. It had no force and effect insofar as you were concerned?
A. I didn't think it had.

Q. You insisted on having 13%?
A. Yes, sir."

John Detrio, another partner, was also called as a witness in behalf of respondents. In his letter of July 14, 1945, to petitioner, Glasscheib (Defts. Ex. Y; R. 1187) he stated that as late as that day he was seeking to make an agreement with petitioner, Boylan, "for the sake of all of us" as to the respective partnership holdings *on the basis of the last signed agreement*, namely, that of September 1, 1944, thus conclusively establishing that he did not acquiesce to the oral agreement of February, 1945.

Even the respondent, Sylvester Detrio, did not recognize the respondent, Louis Detrio, as a partner, for as late as June 2, 1945, he wholly disregarded the letter of the respondent, Louis Detrio (Defts. Ex. X), to reduce the salary of Albert Detrio (R. 1190).

The foregoing testimony, taken in conjunction with the written memorandum of March 19, 1945, from respondent, Louis Detrio, to petitioner, Glasscheib (Defts. Ex. I-I) discussed under Point I of our brief, leads to the inescapable conclusion that at no time was there a complete meeting of the minds of all parties in interest with reference to the alleged oral agreement of March 1, 1945, under which respondent, Louis Detrio, was to re-enter the partnership as a general partner.

Inasmuch as the written agreement (Exhibit E) was legally insufficient, and since the minds of the parties never met on the alleged oral agreement of February 28, 1945, the District Court was fully justified in its conclusion of law (R. 2239) that "there was never at any time a complete meeting of the minds of all the parties in interest, either oral or written, touching the subject matter of the proposed amendment to the partnership".

Since there was never at any time a complete meeting of the minds of all of the parties in interest, no valid partnership agreement resulted. The purchase by respondent, Louis Detrio, from petitioner, Boylan, of a 14% interest was therefore necessarily contingent and revocable. As was held in the case of *McNamara* v. *Gaylord*, 3 Ohio Fed. Dec. 543, 1 Bond. 302 (cited with approval in *Burnet* v. *Leininger*, 285 U. S. 136) at page 546:

> "One partner cannot by agreement sell a part of his interest and compel the other partners to accept the vendee as a member of the firm."

Respondent, Boylan, could not do something indirectly which, as a matter of law, he could not do directly.

We therefore respectfully submit that the Court of Appeals erred when it made factual determinations contrary to the uncontroverted facts fully established, and stated that the findings of the District Court "were clearly erroneous, indeed without any support in the evidence". The judgment of reversal of the Court of Appeals, predicated on such erroneous findings, should be reviewed by this Court under its supervisory powers and in furtherance of justice.

POINT III

The Court of Appeals abused its discretion when it awarded total costs against petitioners in solido.

The Court of Appeals affirmed the judgment of the District Court in the dismissal with prejudice against respondent, Marks. The Court also sustained the District Court in its findings that the written agreement (Exhibit E) was invalid and unenforceable. On the main issues of fraud, conspiracy, conversion and misappropriation, the findings of the District Judge were sustained. The issues of the formation of the respondent, Consolidated Tile Co., Inc., the New York corporation, and the transfer to it of partnership assets belonging to petitioners, Boylan and Glasscheib, resolved in favor of the petitioners, were also sustained by the Court of Appeals. The bulk of the voluminous record pertains to these issues. The testimony with reference to the alleged oral agreement of February, 1945, constituted but an infinitesimal part of the record.

Notwithstanding all this, the judgment of partial reversal of the Court of Appeals decrees that the petitioners in solido "be condemned to pay the costs of this court" (fol. 2281, R. 2280).

Under Rule 31 (3) of the Court of Appeals, Fifth Circuit (see Appendix), the cost of the transcript from the Court below is taxable as part of the costs. The Clerk of the Court of Appeals has informed us that the costs in that Court will amount to approximately $2,-716.25. Counsel for respondents has stated in a motion made in the Court of Appeals, that the cost of the transcript will be "in an amount between six and seven thousand dollars". The total amount of costs will therefore be upwards of $10,000.00.

The respondents, whose duty it was to make up the record on appeal, designated the "entire record" for the consideration of the Court of Appeals (R. 2263-6). Later they filed an amendment to their original designation so as to include additional documents (R. 2266-7). Subsequently, when respondents sought to diminish the record, petitioners voluntarily entered into a written stipulation (R. 1-4) and the size of the record was thereby decreased by upwards of 1,000 pages.

The present size of the diminished record, with its prolixity and repetitiousness is not attributable to the petitioners or their counsel. The record has to do primarily with the written agreement (Exhibit E), the formation of the corporation, fraud, conversion, misappropriation, conspiracy and the alleged interest of the respondent, Marks. On all of these issues the Courts, both District and Appellate, found in favor of petitioners.

We are not unmindful of the fact that the Court of Appeals has full control of costs in equity cases and

can grant and withhold costs in its discretion. However, that discretion must be reasonably exercised.

The Court of Appeals, Fifth Circuit, has held that where the greater portion of the record on appeal is fairly attributable to matters on which the appellants were unsuccessful, the cost thereof should be borne by them.

> *Highway Constr. Co. of Ohio* v. *City of Miami, Fla.*, 126 F. 2d 777, 782.

That Court, in a recent opinion in the case of *Phillips Petroleum Co.* v. *Williams*, 159 F. 2d 1011, stated categorically (p. 1012):

> "Where, however, as here and as is often the case, there is a large record, it is of real moment that the rules designating and printing be complied with. This Court will, therefore, not only entertain with sympathy motions to retax for excessiveness but will of its own motion more often scrutinize records for abuses in this regard with a view of imposing not only on the client, whose counsel has erred, but on counsel, whose duty it is to make up the record, costs commensurate with the breach of this duty."

Petitioners, who were the appellees in the Court below, were powerless to insist upon an abbreviated record. When the respondents, of their own volition sought to diminish the record, petitioners readily agreed.

In the light of the foregoing facts, we respectfully submit that the Court of Appeals abused its discretion when it awarded full costs against petitioners in solido. This Court, under its supervisory powers, should review this matter and make a pronouncement which will be helpful and act as a guidepost for the Courts.

CONCLUSION

It is respectfully submitted that because of all of the foregoing, the Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: New York, N. Y.,
October 22, 1948.

APPENDIX

28 United States Code. Approved June 25, 1948
effective September 1, 1948

Sec. 1254—Court of Appeals—Certiorari

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Partnership Law—Chapter 39 of Consolidated Laws of the State of New York

Article 5. Property Rights of a Partner (§§ 50-54).

Section 53: Assignment of partner's interest. 1. A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

Article 8. Limited Partnerships (§§ 90-119).

Section 98. Rights, powers and liabilities of a gen-

eral partner. (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

• • • • • • •

(e) Admit a person as a general partner.

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate.

Rules of Court of Appeals, Fifth Circuit

Rule 31—Costs.

(3) In cases of reversal of any judgment or decree in this court, costs shall be allowed to the appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

Supreme Court of the United States

OCTOBER TERM, 1948

No. 363

FELIX T. BOYLAN, *et al.*,

Petitioners,

vs.

LOUIS DETRIO, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Respondents.

PETITIONERS' REPLY BRIEF

Preliminary Statement

In view of the nature of the respondents' brief, submitted in opposition to the petition for a writ of certiorari, we are constrained to submit this reply brief.

The Argument

I.

Respondents, in their brief in opposition, under the heading "Statement", state that they "based and bedrocked their appeal upon the admitted testimony of the two defendants in the court below" (p. 4), and then proceed to quote from the opinion of the Court of Appeals (R. 2276-7). They wholly fail to explain or comment upon the testimony given by the petitioner, Boylan, which

immediately follows the part quoted by the Court of Appeals in footnote "5" (R. 2277),—which we have set out in full on page 18 of our main brief.

Counsel for respondents further completely ignore the subsequent uncontradicted testimony of petitioner, Boylan, with reference to the required capital contribution to be made by respondent, Louis Detrio, as a condition precedent, and which he (Louis Detrio) admittedly failed to make.

This omission on the part of respondents is most significant. It clearly demonstrates that they too have fallen into the same grave error,—as did the Court of Appeals. Their claim of the existence of an oral agreement for the re-entry of the respondent, Louis Detrio, as a partner, into the existing partnership, is predicated solely upon a minute portion of the testimony of the petitioner, Boylan, torn out of context, completely disregarding the subsequent pertinent testimony and all the facts developed upon the trial, relating to this subject matter.

II.

The argument of counsel for respondents that the provisions of Section 98 (1) (e) of the New York Partnership Law, have no applicability "because at the time the oral agrement was formed, the articles of partnership expressing the agreement into which respondents entered had not been executed and were not recorded" (p. 6) is absolutely contrary to the facts and therefore grossly misleading.

The Court of Appeals, in footnote 1, subdivision c, (R. 2271) stated that at the conclusion of the evidence the respondents "in order to conform the pleadings to

the proof" further amended paragraph 20 of the amended complaint by alleging that the oral agreement entered into on or about February 28, 1945, "was amendatory to and a part of the original articles of partnership of date February 28, 1943, as subsequently amended, except as to identities and interests of the partners, the life of said partnership being the same term as expressed in the original partnership agreement as set out in Exhibit 'A' hereto".

The original articles of partnership of February 28, 1943 (Exhibit A; R. 22-30), and the subsequent amendment of May 15, 1943 (Exhibit B; R. 30-33) were signed by all of the partners and were duly recorded in the office of the Clerk of New York County, where the partnership had its principal place of business. Defendants' Exhibit D-2 (R. 299-303) conclusively established that the foregoing documents were signed and recorded in the early part of the year 1943.

Counsel for respondents are therefore in grave error when they claim that on February 28, 1945, when the oral agreement was made,—under which respondent, Louis Detrio, was to re-enter the partnership, and respondent, Sylvester Detrio was to reduce his percentage of the profits,—the original articles of partnership as amended had not been signed and recorded.

We respectfully submit that respondents' argument is wholly without merit.

III.

Counsel for respondents fully realize that under the provisions of Section 98 (1) (e) and Section 53 of the New York Partnership Law, and the controlling authorities, the oral agreement of February 28, 1945, did not legally amend the original articles of partnership, as

subsequently amended, and is wholly without any legal force and effect.

With that in mind, counsel for respondents therefore advance the argument that the oral agreement of February 28, 1945, created an oral partnership "as a purported unlimited one, and was operating with full actual effect". They rely upon the authority of *Smith* v. *Maine,* 145 (N. Y.) Misc. 521, for the proposition thus advanced. In fact, they claim that this case "militates diametrically upon the position of the respondents" (p. 6).

In view of this unequivocal statement, we are taking the liberty of quoting at length from the official report of *Smith* v. *Maine* (*supra*). The Court, in the *Smith* case discussed with great clarity and succinctness the fundamental principles of partnership law, and the vital elements essential for the creation of a valid and binding partnership agreement. At pages 525-6 of 145 (N. Y.) Misc., Taylor, J. stated:

> "I will now discuss the relevant law of partnership: (1) The burden of proving the pleaded agreement of partnership (oral and at will) is upon Miss Smith. If the evidence, quality considered, is evenly balanced on that issue, a finding of partnership cannot be made. (2) A partnership may only arise *by mutual agreement* between two or more persons; it exists as to its members where they have agreed to combine their labor, property, and skill, or some of them for the purpose of engaging in any lawful trade or business, and share the profits and losses as such between them. (Partnership Law § 2, being Consolidated Laws of 1909, c. 39, in effect February 17, 1909; Kent's Comm. Lecture 43 (1), relating

to the nature, creation and extent of partnerships). (3) If there is no contract *to be partners*, there is no partnership (*Gordon* v. *Farrell*, 157 App. Div. 409, 410), for such an agreement is the foundation of partnership. (*Smith* v. *Dunn*, 44 Misc. 288, 290, 294, 295). (See, also, *Heye* v. *Tilford*, 2 App. Div. 346, 349, 350; affd. 154 N. Y. 757.) (4) Loose and indefinite talk cannot be made the basis of a finding of a partnership agreement (*Wilcox* v. *Williams*, 19 App. Div. 438, 439, 440). (5) Such a contract 'must be established to the entire satisfaction of a court of equity before its intervention can be demanded.' (Quoted from *Farley* v. *Hill*, 150 U. S. 572, 577, in *Gordon* v. *Farrell*, *supra*). (6) Where the testimony claimed to establish a partnership agreement is lacking in probity and weight and the circumstances are clearly against the probability of its existence, the court's credulity would be too greatly strained by a finding that such agreement was made. (See *Summa* v. *Masterson*, 215 App. Div. 159, 161, 162.) (7) A 'joint undertaking to share in the profit and loss' must be established (*Pattison* v. *Blanchard*, 5 N. Y. 186, 189); and an 'indispensable essential' is 'a mutual promise or undertaking of the parties to share in the profits * * * and submit to the burden of making good the losses'. (*Reynolds* v. *Searle*, 186 App. Div. 202, 203; read also *Cole* v. *Rome Savings Bank*, 96 Misc. 188; *Stoller* v. *Franken*, 171 App. Div. 327; *Chappell* v. *Chappell*, 125 App. Div. 127, affd., 193 N. Y. 653; *Bogardus* v. *Reed*, 160 App. Div. 294; *Thomas* v. *Springer*, 134 App. Div. 640). (8) A proprietary interest in the business is also necessary, or there is no partnership (*Heck* v. *Voelkle*,

95 Misc. 692). Relevant citations might be extended; but the foregoing are sufficient." (Italics by the Court).

Applying the above principles of law to the uncontroverted facts and testimony adduced in the case at bar,—fully discussed and quoted under Point II of our main brief (pp. 17-27),—we find: (a) That the conversations had in February, 1945, between petitioner, Boylan, and respondent, Louis Detrio, were merely tentative in form and of an exploratory nature. The effective date of his re-entry into the firm had not been determined, and no terms were discussed. It was specifically agreed that all these matters were left for future discussion and were to be contained in a written agreement, to be signed by all of the partners, and to be an amendment to the original articles of partnership; (b) There was never at any time a complete meeting of the minds of all parties in interest; (c) There was merely a proposed assignment or transfer of various interests in the future profits, but no agreement on the part of the respondent, Louis Detrio, to share in the losses; and (d) The failure of the respondent, Louis Detrio, to make his required capital contribution and thus acquire a proprietary interest in the partnership.

That the oral agreement of February 28, 1945, did not constitute a partnership agreement is best evidenced by the fact that the remaining partners did not in fact transfer any portion of their interests in the partnership to the respondent, Louis Detrio, and never recognized him as a partner.

Even in cases of general partnership, as distinguished from limited partnerships, Section 40 (7) of the New York Partnership Law specifically provides as follows:

"§ 40. *Rules determining rights and duties of partners.* The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules. * * *

7. No person can become a member of a partnership without the consent of all the partners."

This Court, in the recent case of *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364, 394, clearly stated that the provisions of Rule 52 (a) of the Federal Rules of Civil Practice apply to inferences drawn from documents or undisputed facts, and they should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses.

In the light of the foregoing, we respectfully submit that the findings of the trial Court are fully supported by the uncontradicted facts and documentary evidence of the respondents and their witnesses, as contained in the record. These findings cannot be said under any circumstances to be "clearly erroneous". On the contrary, it was the Court of Appeals which made factual determinations, decisive of vital rights, which are wholly contrary to the uncontroverted facts. These findings are therefore "clearly erroneous" and should be reviewed by this Court.

IV.

The argument advanced by the respondents under Point III of their brief (p. 7) is predicated upon a false premise. They argue that the opinion of the Court of Appeals is silent on the issues of fraud, conspiracy, con-

version and misappropriation, and that on the remand "presumably" these matters would be properly inquired into under the directions of the Court of Appeals.

The directions contained in the opinion (fol. 2280, R. 2279), as well as in the mandate (fol. 2281, R. 2279-80) are clear and unequivocal. They are: (1) to find that by oral agreement respondent, Louis Detrio, re-entered the partnership as of March 2, 1945, and that as of the same date the respondent, Sylvester Detrio's percentage of the profits was reduced from 8% to 5%; (2) to take and state an account on that basis; and (3) to enter judgment accordingly. The District Court must needs follow these directions and cannot go into any other matters. Those matters were already determined and the determination was in favor of petitioners.

The authorities cited on pages 8 and 9 of the respondents' brief are not in point. A few instances will suffice.

The case of *Pierce* v. *Feno*, 184 N. Y. S. 851, primarily involved questions of fact arising from dealings between the parties over a period of 11 years. In *Martin* v. *Peyton*, 246 N. Y. 213, the Court had under consideration a loan secured by collateral and a share in the profits of the business. The Court held that the transaction taken as a whole did not create a partnership relationship. The case of *Casola* v. *Kugelman*, 33 (N. Y.) App. Div. 428, affd. 164 N. Y. 608, simply holds that where a limited partnership is formed, the partners are bound by the terms of the agreement.

CONCLUSION

We respectfully submit that the arguments advanced by the respondents in their brief are wholly without merit. Their utter failure to discuss the facts and authorities set forth in our main brief is tantamount to a tacit acknowledgment by them of the validity of the controlling authorities cited by us and their applicability to the facts in the case at bar.

The petition for the writ should be granted and certiorari issue out of this Court so that the decision and judgment of the Court of Appeals may be reviewed.

Respectfully submitted,

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Dated: New York, N. Y.,
November 17, 1948.

IN THE

SUPREME COURT OF THE UNITED STATES

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of Mississippi and the findings of fact and conclusions of law are found in the Record at

Pages 2225-40. The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 169 F. 2d 77.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on the 23rd day of July, 1948. Thereafter, a petition for rehearing was timely filed and was denied on September 16, 1948. Thereafter, a motion was filed to stay the Mandate so as to permit a petition for writ of certiorari to be filed, and on the *25th* day of *Sept., 1948*, an order was entered granting this stay. Thereupon, the respondents filed a motion asking the court to amend the order staying the Mandate so as to require the petitioners to give supersedeas security, as provided by Rule 38, Section 6, and Rule 36 of the United States Supreme Court Rules. This motion was overruled. The jurisdiction of this Court is invoked by the petitioners under 28 U. S. Code, Section 1254 (1).

QUESTIONS PRESENTED

The petitioners, in their petition and brief, present five questions, as follows:

"(1) Can a limited partnership, formed and existing under the laws of the State of New York, admit a general partner by oral agreement, when the express provisions of Sec. 98 (1) (e) of the New York Partnership Law specifically provide that no general partner can be admitted without the written consent or ratification of all the limited partners?

"(2) Can such limited partnership be orally amended so as to admit a general partner, when the original written articles of partnership specifically provide that any amendments or alterations thereto must be in writing under the joint hands of all parties?

"(3) Under the provisions of the New York Partnership Law, does an assignment by a partner of a portion of his partnership interest to a stranger, make the assignee a partner of the partnership?

"(4) Can a person become a general partner and participate in the profits when he does not make his required capital contribution, as specifically agreed to by him?

"(5) Has there been an abuse of discretion by the Court of Appeals, when in its judgment it awarded total costs against your Petitioners in solido?"

Whether or not these questions are real issues will be discussed under our argument in this brief, but respondents do take the position that there are no questions whatever presented, in which the United States Circuit Court of Appeals for the Fifth Circuit has reached its decision, in conflict with the applicable law of the State of New York, but on the contrary, that the decision of the Fifth Circuit is in entire harmony with the laws of the State of New York; that no other substantial question is presented.

STATEMENT

In stating the controlling facts in this case, we cannot

do better than to cite the footnotes to the opinion of the Circuit Court of Appeals, 169 F. 2d 77, and continuing on each page to the foot of page 81. These footnotes condense in concise and pertinent form the undisputed facts as found by the Circuit Court of Appeals.

The appellants in the court below, respondents here, based and bedrocked their appeal upon the admitted testimony of the two defendants in the court below so that there was not presented to the Circuit Court of Appeals any question of determination to be based upon a finding of conflict of fact, but on the contrary, the question was presented that the trial court had erred in failing to find for the appellants upon the admitted facts of the defendants in the District Court. No where is this better shown than in the opinion of the Circuit Court of Appeals at page 81 of the citation, supra, wherein the court stated as follows:

"In the face, then, of Boylan's testimony: 'His brothers and Mr. Glasscheib agreed to an amended agreement where he would come back into the company as of March 1st' (Rec. 699), and of that at Record p. 710: (Q) 'About March 1st, it was agreed among you that Mr. Louis Detrio was to come back into the partnership as a full partner with a 36⅔ interest?' (A) 'That's right,' and of the undisputed facts of record that Detrio returned to his partnership drawing status of $2500 per month and his active management as a general partner, it will not do to claim, as appellees do, and the court finds, that for want of a writing this agreement of partnership was incomplete and ineffective."

ARGUMENT

We shall answer the arguments in the order presented by petitioners, but we first wish to point out that we have examined very carefully the cases cited on pages 8 and 9 of petitioners' brief and are unable to find anything in their holding which would justify the granting of a writ in the instant case.

Point I.

Under this heading the petitioners argue that the learned Circuit Court of Appeals for the Fifth Circuit erroneously determined important questions arising under the statutory laws of New York governing limited partnerships.

These statutes of the State of New York have no application unless the partners themselves comply with them by executing partnership articles and filing them for recordation as by the statutes provided; and this being omitted of observance by the partners, those who sought to gain protection as limited partners simply are classed as general partners as to all who deal with the partnership. There is no requirement of the laws of New York that the formation of a partnership must be exclusively manifested by executed written articles of partnership; nor do the laws of New York inhibit as between the partners an oral amendment of written partnership articles. A complete answer to the appellees' contention in this respect is presented by the admitted fact that the articles of partnership into which the respondent Louis Detrio entered by oral agreement of all the partners in February, 1945 was not

manifested by written articles signed by all the partners until after he had entered it, and was not recorded under the laws of New York until July 31, 1945, long after he had re-entered the partnership, (Rec. *36-39*); as said the Circuit Court of Appeals for the Fifth Circuit in its opinion in the cause, 169 F. 2d, pages 80 and 81:

"It (the dealings between the partners) is also a story of formal informality, informal formality, of things agreed to in substance orally and thereafter acted on as agreed, and later, only as matter of form, reduced to writing."

In other words, the statutes of New York governing limited partnerships, invoked so vehemently by the respondents, have no applicability to the questions here presented because at the time the oral agreement was formed, the articles of partnership expressing the agreement of partnership into which the respondents entered had not been executed, and were not recorded, although the partnership as a purported unlimited one, was operating with full actual effect.

The New York authority principally relied upon by the respondents in support of their argument to the contrary is *Smith v. Maine, 145 Misc. 521, 260 N. Y. S. 425;* and this authority expressly holds that the laws of New York do not inhibit or invalidate the oral formation of a partnership. In that regard, the authority militates diametrically upon the position of the respondents.

Point II.

In answering Point II, we again refer to the opinion

of the Circuit Court of Appeals which reveals in the footnotes to the opinion precisely the same proposition that the appellants presented in asking the court to reverse the District Court; namely, that the testimony of the defendants alone completely and unequivocably supported the appellants' contentions and caused the court to find in favor of them on appeal. Of course, the rights were vital rights, but the testimony upon which the Circuit Court of Appeals based its decision was not upon controverted testimony, but on the contrary upon the undisputed testimony which was given by the defendants Boylan and Glasscheib.

Point III.

There is no merit in petitioners' contention that the court abused its discretion when it awarded total costs against the petitioners in solido. No where in the opinion of the court or judgment is there any support for the petitioners' statement that the Circuit Court of Appeals sustained the District Court on its findings on the issues of fraud, conspiracy, conversion, and misappropriation; that on the contrary, the opinion is entirely silent upon these issues, presumably because these matters would be properly inquired into under the directions of the Circuit Court of Appeals on the remand. All that the court of Appeals sustained the District Court on was that Marks never did become a partner or have any right under the written contract.

Therefore, the costs were properly taxable and is not a matter of proper review before this tribunal. The record which was presented in the court below was necessary for a proper determination of all the issues between the par-

ties, and there was no effort made by the appellees below, petitioners here, to diminish the record any more than the agreement which was executed by both parties and which is found in Record Volume I, page 1.

We cannot agree that petitioners were powerless to insist upon an abbreviated record. On the contrary, they had the right to so insist if they had chosen and could have made proper showing, but instead, they chose to sit silently by and to raise it for the first time in this petition. The Circuit Court of Appeals did not abuse its discretion in anywise.

CONCLUSION

As stated previously, we have examined carefully all of the authorities cited by the petitioners and can no where find anything to sustain their position in requesting a writ of certiorari. As previously stated, the leading New York case of *Smith v. Maine (1932), 145 Misc. 521, 260 N. Y. S. 409*, not only does not sustain petitioners but on the contrary shows quite clearly that the opinion of the Fifth Circuit in this case does not conflict with *Smith v. Maine* but is in harmony with it. In this case, the New York court reviewed at length quite a number of New York cases, all of which sustained the respondents' position here rather than the petitioners. In addition, the following New York cases are also against petitioners and fully sustain respondents' position:

Pierce v. Feno, et al., 184 N.Y.S. 851;

Martin v. Peyton, 246 N. Y. 213, 158 N E. 77;

Weinstein v. Weldon, 80 Misc. Rep. 348, 142 N. Y. S. 406;

Casola v. Kugelman, 33 App. Div. 428, 54 N. Y. S. 89, affirmed by memorandum, 164 N. Y. 608, 58 N. E. 1085;
Kearney v. Korris, 18 N. Y. S. 346;

In re Rosenberg's Will, 251 N. Y. 115, 167 N. E. 190;

47 Corpus Juris, Sec. 233, page 782;
Rubin v. Whitney, 162 Misc. 821, 295 N. Y. S. 255.

For the reasons set forth above, the petition for certiorari herein should be denied.

Respectfully submitted,

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